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May 23, 2011

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings

MAY 23 2011

Part of
Public Record

Re: **Finance Docket No. 35476**
Wisconsin Central Ltd. -- Intra-Corporate Family Merger
Exemption -- Duluth, Missabe and Iron Range Railway Company
and Duluth, Winnipeg and Pacific Railway Company

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Reply to Petition for Revocation of Wisconsin Central Group**, dated May 23, 2011.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Wisconsin Central Ltd.,
Duluth, Missabe and Iron Range Railway Company
and Duluth, Winnipeg and Pacific Railway Company

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35476

WISCONSIN CENTRAL LTD.
-- INTRA-CORPORATE FAMILY MERGER EXEMPTION --
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
AND DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY

**REPLY TO PETITION FOR REVOCATION
OF WISCONSIN CENTRAL GROUP**

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**ATTORNEYS FOR
WISCONSIN CENTRAL LTD., DULUTH,
MISSABE AND IRON RANGE RAILWAY
COMPANY AND DULUTH, WINNIPEG AND
PACIFIC RAILWAY COMPANY**

Dated: May 23, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35476

WISCONSIN CENTRAL LTD.
-- INTRA-CORPORATE FAMILY MERGER EXEMPTION --
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
AND DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY

**REPLY TO PETITION FOR REVOCATION
OF WISCONSIN CENTRAL GROUP**

Wisconsin Central Ltd. ("WCL"), Duluth, Missabe and Iron Range Railway Company ("DMIR") and Duluth, Winnipeg and Pacific Railway Company ("DWP") hereby reply to the petition for revocation filed in this proceeding by Wisconsin Central Group ("WCG"), a self-described "*ad hoc* rail freight shippers coalition." Under 49 U.S.C. § 10502(d), the Board may revoke an exemption when it finds that regulation is necessary to carry out the transportation policy of 49 U.S.C. § 10101. WCG has made no serious effort to satisfy the revocation standards, and it has identified no relationship between the concerns it purports to hold and the transaction which is the subject of this proceeding. Its revocation petition should be denied.

WCL, DMIR and DWP are affiliated carriers¹ which have invoked a class exemption under 49 C.F.R. § 1180.2(d)(3) for the intra-corporate family merger of DMIR and DWP with and into WCL, with WCL as the surviving corporation.² In accordance with the

¹ WCL, DMIR and DWP are three of the U.S. operating subsidiaries of Canadian National Railway Company ("CNR"), their indirect parent. CNR and its railroad subsidiaries operate under the trade name "CN."

² The exemption is subject to the employee protective conditions in New York Dock Ry. -- Control -- Brooklyn Eastern Term. Dist., 360 I.C.C. 60 (1979). Accordingly, the transaction will be consummated only after completion of appropriate labor implementing agreements.

Board's governing regulations, WCL, DMIR and DWP verified that the proposed merger, inter alia, would not result in adverse changes in service levels or any change in the competitive balance with carriers outside of the CN corporate family. WCL and DMIR/DWP connect only at the Twin Ports of Duluth, Minnesota and Superior, Wisconsin, with the lines of DMIR/DWP extending north from the Twin Ports through Minnesota and the lines of WCL extending south into Wisconsin. As the parties explained in their notice of exemption, the proposed merger will address certain service and terminal inefficiencies in and around the Twin Ports, as well as allow simplification of CN's corporate structure. Verified Notice of Exemption, filed April 8, 2011, at 5-6.

WCG's revocation petition challenges none of these actual aspects of the proposed intra-corporate merger, and indeed WCG did not seek a stay of the merger exemption because "WCG has no desire to delay cost savings and other operational benefits the parties state will be achieved by consummation of the transaction." WCG Petition at 5 n.2. Instead, WCG appears to be using this proceeding as an opportunity to re-assert preexisting complaints regarding competition for "non-captive freight" originating or terminating on the lines of the "WC System" in Wisconsin.³ It then seeks an "assurance" that the proposed merger will "in no way preclude, hinder, impair or impede corrective actions" that WCG believes CN must undertake regarding local, "non-captive" traffic in Wisconsin. WCG Petition at 5.

³ As used by WCG, "WC System" refers to the U.S. rail system (including the lines of WCL) controlled by Wisconsin Central Transportation Corporation ("WCTC") at the time CNR acquired WCTC in 2001. See Canadian National Ry. Co. -- Control -- Wisconsin Central Transp. Corp., 5 S.T.B. 890 (2001) ("CN/WC").

WCG offers no rationale for how an intra-corporate merger of established affiliates⁴ would adversely affect the competitiveness of local CN rail service in Wisconsin, particularly when DMIR and DWP -- the entities to be merged into WCL -- provide no local service in Wisconsin themselves outside of the Twin Ports. WCG's sole stated objection is that the WCL/DMIR/DWP notice of exemption did not specifically reference competition with other modes -- motor carriers, in particular -- when making the representation that the proposed merger would not result in "any change in the competitive balance with carriers outside of the corporate family." WCG Petition at 4-5 ("the fact that the Notice of Exemption contains no mention of competition with other modes raises a significant concern for WCG."). CN cannot imagine how the merger of DMIR and DWP into WCL would change the railroad's competitive relationship with motor carriers, and WCG has suggested no way in which it could. And while WCG might have preferred a more expansive statement concerning competition, WCL/DMIR/DWP made exactly the representation required by the Board's regulations in order to invoke the intra-corporate family transaction class exemption. See 49 C.F.R. § 1180.2(d)(3).⁵ The merger of DMIR and DWP into WCL will not adversely affect CN's commitment and ability to provide adequate rail service to shippers in Wisconsin.

The party seeking revocation of an exemption has the burden of proof, and petitions to revoke "must be based on *reasonable, specific concerns* demonstrating that

⁴ CNR has controlled DMIR since 2004, WCL since 2001, and DWP for a century. See CN/WC; Canadian National Ry. Co. -- Control -- Duluth, M. & I.R. Ry. Co., 7 S.T.B. 526 (2004).

⁵ It is not obvious in any event from either the language of the regulation or its brief rulemaking history that WCG is correct in suggesting that "[t]he term 'carriers' at 49 CFR 1180.2(d)(3) includes carriers of other modes, including motor carriers." WCG Petition at 4. See Railroad Consolidation Procedures, 363 I.C.C. 200, 205 (1980); Railroad Consolidation Procedures, Ex Parte No. 282 (Sub-No. 3), 44 Fed. Reg. 66626, 66627 (November 20, 1979).

reconsideration of the exemption is warranted and regulation of the transaction is necessary." I&M Rail Link, LLC -- Acq. & Oper. Exem. -- Canadian Pacific Ry., 2 S.T.B. 167, 174 (1997) (emphasis added), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). In its petition, WCG does little more than pose a question, without any specific facts or contentions to support it. Absent an exemption, WCG acknowledges that 49 U.S.C. § 11324(d)(2) would govern the transaction. WCG Petition at 6. Under that provision, the Board would be required to approve the merger unless it was likely to result in a "substantial lessening of competition." WCG must be required to at least *suggest* in its petition to revoke how a merger of DMIR and DWP into WCL could have such consequences. It has not.

In place of an absent legal rationale for its revocation request, WCG has re-submitted its comments in two recent ex parte proceedings at the Board.⁶ Those comments focus on a singular theme: that CN has deemphasized and downgraded local service in Wisconsin in order to accommodate international intermodal traffic that arrives at Prince Rupert, British Columbia and traverses WCL's Superior-Chicago main line through Wisconsin. That theme is unfounded. As explained in the attached verified statement of Robert S. Bart, CN's Senior Manager, Service Design ("Bart V.S."), the WCL Superior-Chicago line has more than sufficient capacity for all present and reasonably foreseeable future traffic of all types, including local traffic. Indeed, over most of its length that line could handle nearly double the average number of trains that it currently handles. Bart V.S. at 3.

⁶ Ex Parte No. 704, Review of Commodity, Boxcar and TOFC/COFC Exemptions, Verified Statement on Behalf of Wisconsin Central Group, dated January 25, 2011 ("WCG EP 704 Statement"); Ex Parte No. 705, Competition in the Railroad Industry, Initial Comments of Wisconsin Central Group, dated April 8, 2011 ("WCG EP 705 Comments"). Both pleadings were attached to WCG's petition for revocation.

Today there is a single, daily Prince Rupert train in each direction over the line, to be joined soon by a second three day/week Prince Rupert train in each direction. Bart V.S. at 2, 3. This is a small proportion of the overall number of trains on the line. Moreover, WCG's repeated assertion that by 2015 CN will "increase the number of international trains transiting the Superior-Chicago mainline from the current low 20s to the mid-60s"⁷ has no basis in reality. Far from operating more than 20 daily "international" trains over the WCL mainline, as WCG apparently believes, the actual average number is 8.7 such daily trains, to be joined in the near future by an average of two additional international trains per day. Bart V.S. at 2, 3. That number includes the Prince Rupert trains. There is no conceivable basis for WCG's claim that its already inflated count of existing international trains will *triple* in the next four years, to a number "in the mid-60s." See Bart V.S. at 3. Indeed, WCG's prediction would represent a *sextupling* of the actual current number of international trains.

Further, CN has consistently invested in its WCL line through Wisconsin, extending sidings and undertaking other capacity- and efficiency-enhancing projects. Bart V.S. at 3. CN also continues to respond to and build local traffic opportunities in Wisconsin. Currently CN is undertaking to develop a mini-intermodal ramp at Chippewa Falls that will be used for the receipt of traffic for transload and delivery by truck in Wisconsin and surrounding states. Bart V.S. at 4. And CN representatives are meeting with WCG members on June 7 in Wausau, Wisconsin to review and address concerns those shippers have regarding CN service in Wisconsin. CN takes those concerns seriously, and is prepared to demonstrate that international, national and local traffic is and can all be accommodated on its lines in the state, just as it is elsewhere on CN's system.

⁷ See WCG EP 704 Statement at 9; WCG EP 705 Comments at 15.

On the other hand, WCG cannot expect, as it appears it does, that rail service in Wisconsin will be frozen in time from the moment of the CN/WC transaction in 2001. Rail service throughout the other forty-seven contiguous states has continued to evolve since then in response to changing competitive and market conditions. WCG cannot exempt Wisconsin from those developments, nor should CN be constrained from responding to them. CN is proud of its record of providing reliable rail service and would not have sought to acquire the WC network without the belief and expectation that it could meet Wisconsin customers' needs and add value to them. CN believes it has and continues to do so. The Board has long recognized that in implementing consolidations carriers must have flexibility to adjust prior operating and service plans in response to changing market conditions to maximize the potential of their networks in serving all of their customers. See, e.g., Major Rail Consolidation Procedures, 5 S.T.B. 539, 578, 579, 610 (2001).⁸ Nor should WCG be able to bootstrap statements in the CN/WC control proceeding of nearly a decade ago into regulation of rail rates with revenue/variable cost ratios of less than 180% that are outside of the Board's jurisdiction -- which is what WCG apparently wants to do with its complaints about "competitiveness problems" with "non-captive freight." See WCG EP 705 Comments at 2 (providing WCG's definition of "non-captive freight" as "freight which contributes to going concern value with revenue/variable cost ratios between 100 and 180."); compare 49 U.S.C. §§ 10701(c), (d)(1), 10707(d)(1)(A).

⁸ The Board has thus recognized that "applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application." 5 S.T.B. at 610. The need for flexibility and inevitability of change are only heightened with the passage of time. Thus, while WCG complains (WCG EP 704 Statement at 7, WCG EP 705 Comments at 12) that CN no longer has a "Wisconsin Central Division," as was contemplated in the CN/WC proceeding (and as existed for several years post-control), it is neither unusual nor problematic that CN has engaged in system-wide divisional restructuring during the intervening decade.

If WCG shippers or the Wisconsin Department of Transportation ("WisDOT")⁹ have specific complaints about CN's rates or service that cannot be resolved with CN, we acknowledge that they can seek redress for those complaints in appropriate proceedings. What WCG and WisDOT should not be permitted to do is use vague allegations about traffic and competition to meet the stringent standards for revocation of the class exemption invoked by CN for the current intra-corporate merger transaction. WCG has failed to identify any actual adverse effects arising from that transaction, or even any basis or logic why the merger of DMIR and DWP into WCL would be expected to harm the local rail service that WCL already provides in Wisconsin. In the absence of such a demonstration, WCG's revocation petition must fail.

⁹ WisDOT filed a Notice of Intent to Participate and separate Comments in this proceeding that were dated May 2, 2011 but not filed until May 16, 2011. Counsel for WCL/DMIR/DWP received service copies of those pleadings on May 5 and May 11, 2011. WisDOT "does not oppose this exemption, and does not seek a stay in this proceeding." WisDOT Comments at 1. WisDOT encourages CN to address WCG's concerns, and also encourages the Board "to ensure that the commitments stated in STB Finance Docket No. 34000 [i.e., the CN/WC proceeding] and Finance Docket No. 35087 [i.e., the CN/EJ&E proceeding] are incorporated into the approval of this docket." WisDOT Comments at 3. For the reasons stated above, CN does not believe the proposed intra-corporate merger of WCL, DMIR and DWP has any relationship to the subjects WisDOT addresses, and there is no basis to "incorporate" any conditions into the current merger exemption.

WHEREFORE, WCL, DMIR and DWP respectfully request that WCG's petition for revocation be denied.

Respectfully submitted

By:


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**ATTORNEYS FOR
WISCONSIN CENTRAL LTD., DULUTH,
MISSABE AND IRON RANGE RAILWAY
COMPANY AND DULUTH, WINNIPEG AND
PACIFIC RAILWAY COMPANY**

Dated: May 23, 2011

**VERIFIED STATEMENT
OF
ROBERT S. BART**

My name is Robert S. Bart. I am Senior Manager Service Design-East and Intermodal for Canadian National Railway Company which together with its operating subsidiaries is known as "CN." I am responsible for the design and maintenance of the schedules for all trains in CN's Eastern Region and all CN intermodal trains systemwide. I am very familiar with the number and schedules for the intermodal trains CN operates between Prince Rupert, British Columbia and Chicago. I have spent 17 of my 34 years with CN working in the areas of service design and strategic planning.

I understand that an ad hoc group of rail freight shippers calling themselves "the Wisconsin Central Group" recently asserted to the Board that the Prince Rupert intermodal trains and other CN "international" trains are consuming the capacity of CN's mainline across Wisconsin to the detriment of trains carrying local Wisconsin traffic, and that CN plans to increase the number of such trains on the line "from the current low-20s to the mid-60s." Their assertions simply do not reflect reality.

CN's former Wisconsin Central mainline between Superior, Wisconsin and Chicago, Illinois is a single track but high capacity mainline with ten thousand foot passing sidings spaced approximately every 10-15 miles, operated under Centralized Traffic Control. The mainline is predominantly 136 lb. CWR with a maximum timetable speed for freight trains of 60 mph.

The mainline across Wisconsin traverses three subdivisions: the Superior Sub between Superior and Stevens Point, Wisconsin, the Neenah Sub between Stevens Point and

Fond du Lac, Wisconsin, and the Waukesha Sub between Fond du Lac and Schiller Park (Chicago), Illinois.

Using standard railroad track capacity modeling, without converting the line to full double track or constructing any additional passing sidings, the "practical" capacity of the Superior Sub is around 24 trains per day, the Neenah Sub 29 trains per day and the Waukesha Sub (which involves some double track) 35 trains per day. ("Practical" capacity is approximately 67% of the theoretical maximum or "full" capacity.)

By comparison, the average number of trains operated over CN's mainline per day by subdivision for the years 2006-2011 (through early May) is as follows:

	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>
Superior	13.6	13.0	14.3	11.9	12.9	13.5
Neenah	16.1	15.9	17.6	13.6	15.7	14.9
Waukesha	26.5	26.6	26.1	17.3	22.8	22.0

Of these, the average number of "international" trains (*i.e.*, trains moving to or from Canada) per day by subdivision for the same years is as follows:

	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>
Superior	10.7	10.2	11.2	8.7	9.2	8.7
Neenah	10.7	10.2	11.2	8.7	9.2	8.7
Waukesha	10.7	10.2	11.2	8.7	9.2	8.7

Of these "international" trains, two (one in each direction) per day are trains transiting the Superior-Chicago mainline between Prince Rupert and Chicago.

As can be seen from this data, the average number of all trains per day and, of those, the average number of "international" trains per day moving over the line have not only not increased, but have declined over the past five years in part due to lower traffic volumes as a result of economic conditions and in part due to capacity improvement projects undertaken by CN on the line (such as lengthening sidings to 10,000 feet) to handle longer trains. Such capacity improvement projects since 2002 included extending ten passing sidings, building two additional sidings at Chittamo and Ackerville, Wisconsin, building yard infrastructure at Stevens Point, Neenah and Fond du Lac, Wisconsin to allow trains to move through these yards faster, and making track improvements at South Itasca, Wisconsin that increased track speed over a connecting track from 10 mph to 40 mph and increased track speed on the mainline from 50 mph to 60 mph. The result is that CN's mainline has sufficient capacity to handle both the "international" and the local trains. What's clear from the data is that not only is there sufficient capacity for trains carrying local traffic, the mainline over most of its length could handle nearly double the average number of trains that it currently handles.

CN does expect that over time train volumes on the mainline will grow as economic conditions improve and as a result of CN marketing initiatives. For example, CN expects to soon add a three days per week Prince Rupert train in each direction over the mainline. CN also expects to add an additional four "international" trains per week in each direction over the line in the next several months. Even with these added trains, together averaging two trains per day, the average total number of trains on CN's mainline across Wisconsin will be in the low-to-mid-20s per day. That's an average of less than one train per hour. I know of no traffic projections that contemplate a tripling of the number of trains in the next few years. The proposed consolidation of three existing CN operating subsidiaries -- intended to address certain

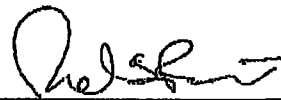
service and terminal inefficiencies in and around the Twin Ports -- triggers no need for any capacity improvements on the mainline because the consolidation will not result in any increase in the number of trains on the mainline across Wisconsin.

Finally, I would point out that CN's infrastructure investments in Wisconsin are not limited to making improvements on the mainline. We are currently designing train service to support a new mini-intermodal ramp that CN is undertaking to develop at Chippewa Falls, Wisconsin (which is not on the mainline). When fully built out, the ramp will have the capacity to handle 400 containers/trailers per week. This will be a brand new intermodal facility in west central Wisconsin where none exists on CN today. This additional traffic will be absorbed into the available capacity on the current trains.

CN is planning for the future. As CN traffic volumes grow -- as we expect they will -- CN has the means and the ability to assure that capacity keeps pace. As part of our normal long-range operations planning, we've identified additional locations along the mainline where new passing sidings can be constructed or existing sidings lengthened to increase line capacity when needed. Ultimately, we could connect the sidings and create a double track mainline. I am confident that CN will continue to have ample capacity to handle national, international and local traffic on its lines in Wisconsin.

VERIFICATION

Robert S. Bart, under penalty of perjury of the laws of the United States, declares and verifies that he is Senior Manager, Service Design of Canadian National Railway Company, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.

A handwritten signature in dark ink, appearing to read 'Robert S. Bart', is written over a horizontal line.

Robert S. Bart

Dated: May 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2011, a copy of the foregoing **Reply to Petition for Revocation of Wisconsin Central Group** was served by electronic mail and overnight delivery upon:

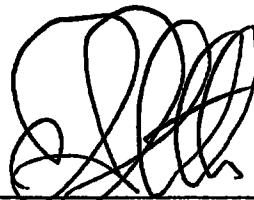
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A handwritten signature in black ink, appearing to read 'Tom Litwiler', is written over a horizontal line.

Thomas J. Litwiler